United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

310

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

CIRCUIT

APPELANT'S BRIEF

UNITED STATES OF AMERICA v. BERNARD WELDON, Appellant	No. 71-1140

Appeal from United States of America v. Bernard Weldon, Criminal No. 1711-70, in the United States District Court for the District of Columbia.

JOHN C. BENNISON
1633 CONNECTICUT AVENUE, N.

Submitted: August 2, 1971

By: Charles S. Vizzini
983 National Press Building
Washington, D. C. 20004
Tel: 638-5858

APPOINTED BY THIS COURT

TABLE OF CONTENTS OF BRIEF

This Case Has Not Previously Been Before
This Honorable Court on Appeal

TABLE OF CASES

* Cases chiefly relied on

STATEMENT OF THE ISSUES

Did the trial court err in admitting into evidence 61 pieces of undelivered mail taken from the trunk of defendant's motor vehicle?

Did the trial court err in refusing to dismiss the indictments or to direct a judgment of acquittal based upon lack of allegation of "felonious intent" in indictments, opening statements, prosecution of case-in-chief and entire case?

Did the trial court err in denying defendant's motion made *in limine* that he be allowed to have witnesses testify as to their general opinion of the defendant's character as to the traits in issue?

I. JURISDICTIONAL STATEMENTS

The defendant was tried and convicted or acquitted of various criminal charges, as follows:

First Count -- Embezzlement of mail by Postal Service Employee
18 U.S.C. 1709
Guilty

Second Count - Theft of mail matter
18 U.S.C. 1709
Guilty

Third Count - Unlawful possession of stolen mail matter
18 U.S.C. 1708
Guilty

Fourth Count - Delay of mail
18 U.S.C. 1703
Guilty

Fifth Count - Taking a letter before it had been delivered to addressee and opening same with intent to obstruct the mail.
18 U.S.C. 1702
Guilty

Sixth Count - Delay of mail
18 U.S.C. 1703
Not guilty

He was sentenced to concurrent terms of eighteen to fifty-four months, all concurrent. Execution was suspended and he was placed on five years probation.

Appelant conducts this direct appeal in forma pauperis, leave of court having been obtained and counsel appointed.

REFERENCE TO PARTIES AND RULINGS IR

ruling denying motion to suppress evidence of mail (103-106)
ruling denying motion regarding charges to witness testimony (145-6)
ruling denying judgment of acquittal (no reason) (284)
ruling denying alternative motion for judgment of acquittal (405)

II. STATEMENT OF THE CASE

On March 11, 1970, defendant, Bernard Weldon suspected of having in the past committed postal crimes was carefully watched through the gallery peephole by the use of seven power binoculars by postal inspectors while he went about the morning's task of sorting the mail and preparing to leave on his route. He was observed fingering two planted envelopes in the manner commonly used in the trade to see if money is inside, making a diagonal line across the address of one of the envelopes, to wit, an undeliverable one (bad address), going to the men's room, returning therefrom, and wrapping one of the envelopes (orange one) in paper towels, and then leaving the post office to go on his route taking with him his mail, including the two envelopes.

He was followed on his route, and there was testimony that he did not place the deliverable envelope in the addressee's mail box. There was also testimony that he did not deliver it in person when arriving at the addressee's post office address.

Subsequently, there was testimony that said mail box was checked as late as 2 p.m.

He returned to the post office at 2:10. Upon leaving the post office at 5:25, he was arrested by his car, taken inside, read his rights, searched, the orange envelope discovered in his pocket along with paper towels, and his hand glowed green under the ultraviolet light showing that it had come into contact with a substance similar to that placed on the contents of the orange envelope. The other envelope was never recovered. Expert testimony was introduced showing that the orange envelope had been opened rather than being sealed improperly.

His car keys were taken from him after his arrest and prior to interrogation. The car was driven into the post office garage where the trunk was promptly searched and sixty-one pieces of undelivered mail discovered. (He was acquitted on the charge stemming from the sixty-one pieces of mail.)

Defendant defended on the grounds he, in fact, delivered the missing envelope to the addressee at a different address. As to the orange envelope, he claims it was open when received by him, he checked to see if it was money, and determined to deliver it in person as he had done with numerous other patrons rather than put it in the mail box. The patron not being home, he determined to deliver it on the following day.

Since honesty was very much in issue defendant tried, but was unsuccessful, in getting a pre-trial ruling that his witnesses be allowed to give their general opinions as to the traits in issue.

Defendant also moved to suppress introduction of the 61 pieces of mail resulting from the search. He also objected to their admission. Their admission was very prejudicial to the defendant's credibility on the other five counts.

He also moved to dismiss all of the indictments and to have a judgment of acquittal based upon the lack of allegation of felonious intent in the indictments, opening statement, case-in-chief and entire case.

III. ARGUMENT

A. The trial court erred in admitting into evidence 61 pieces of undelivered mail taken from the trunk of defendant's motor vehicle.

The leading case on this subject is Preston v. U.S. 376 U.S. 364, 84 S. Ct. 881. It was raised by defense counsel at the trial (TR 100) and lengthy argument followed (TR 100-106). Recognizing the motor vehicle -- dwelling distinction raised in Carrol v. U.S. 267 U.S. at 153, 45 S. Ct. at 285, the court nonetheless, held that the standard was "was the search reasonable"and held that inasmuch as the defendant was already under arrest and the car safely in town, a warrantless search could not be justified. And this, despite the fact that the police had probable cause to believe the car itself was stolen Preston, supra, at 883.

In Harris v. U.S. 390 U.S. 234, 88 S. Ct. 992, such a search was allowed on the sole ground that the car was lawfully in the custody of the Metropolitan Police Department and a police regulation authorized the search of the car as a security measure for the protection of the car and its contents. Such a search was therefore justified.

In Dyke v. Taylor, 391 U.S. 216, 88 S. Ct. 1472, the court clearly distinguished between the Preston fact situation and the Cooper v. California 386 U.S. 58, 87 S. Ct. 788 situation. Cooper, like Harris, was a case where the police were impounding the car. In Dyke supra, as in the instant case, the authorities were holding the case as a convenience to the owner (it had been on a public street during rush hour). The alleged postal service - - private car use contract gave the postal authorities no right to inspect the car after working hours.

As recently as June 23, 1969, the Supreme Court of the United States in Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, in thoroughly reviewing the entire law of searches and seizures without warrants related in time and place to arrests, reiterated its approval of the Preston rationale.

On January 22, 1970, the United States Court of Appeals for the Fifth Circuit decided U.S. v. Montos 421 F2nd 215, a case involving search of a car owned by a postal service employee lawfully arrested without a warrant but with probable cause in his car in a parking lot. The postal officers were invited into the car by the defendant when they indicated that they wanted to talk to him and then noticed some stolen articles when they were seated in the car. The court affirmed the search (at 225) on the grounds that the officers had "probable cause" and it was not "reasonably practicable" to obtain a search warrant. There was absolutely no discussion of the Preston line of cases. Indeed, the court specifically stated in a footnote at page 225, that the case was being decided without reference to Chimel, supra, as that case was deemed prospective in operation.

In Chimel, supra, at page 2040, the court specifically affirmed Preston, supra, stating that the rule of contemporaneous searches is justified when necessary to take weapons or evidence located on the "accused's person or under his immediate control." Additionally, in the instant case, a search warrant might have been obtained as early at 2:10 p.m. (TR 102)

B. The trial court erred in refusing to dismiss the indictments or to direct a judgment of acquittal based upon lack of allegations of "felonious intent" in indictment's opening statement prosecution of case-in-chief and entire case.

This defense was raised at the conclusion of the government's case (TR 283), at the conclusion of the entire case (TR 405) and on prior motions.

In U.S. v. Jordan, 284 Fed Supp. 758, decided on May 28, 1968, the court granted motions to dismiss informations under 18 U.S.C. 1709, based on the lack of the words "felonious intent" in said information. It reasoned that the statute was a substantial codification of a common law crime and accordingly, where the statute was incomplete, i.e., did not allege all of the elements, mere use of the statutory language was insufficient.

Morrisette v. U.S. 342 U.S. 246, 72 S. Ct. 240, a United States Supreme Court Case, then seventeen years old, was relied on. That case involved the same reasoning except that a conversion of government property was involved.

In U.S. v. Hughes, U.S. v. Stack, 340 F2nd (First Circuit), decided January 20, 1965, the court held, in a case involving unlawfully removing merchandise in customs' custody, that the statute was a common law codification but unfortunately, did not contain the necessary elements, so that the use of the statutory language in the indictment was insufficient.

Closer to home, in Ray v. U.S., 229 Atl 2nd 161, decided by the D.C. Court of Appeals on May 2, 1963, the court held that the statute defining larceny against the United States was "merely a codification of common law larceny" with the owner specified in the statute. Citing Hughes and Morrisette, supra, the court reversed and directed the District of Columbia Court of General Sessions to enter a judgment of acquittal on the grounds that there was no showing of a "clearly adverse taking" (conversion).

C. The trial court erred in denying defendant's motion made in limine that he be allowed to have witnesses testify as to their general opinion of

the defendant's character for the traits in issue (TR 144).

The defendant incorporates in its entirety the "Memorandum in Support of Defendant's Contention that Defendant's Character Witnesses Should Be Allowed to Give Their Opinion as to the Defendant's Character."

It follows below (on next page)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal No. ~~959-70~~ 1711-70

BERNARD WELDON :

MEMORANDUM IN SUPPORT OF DEFENDANT'S CONTENTION THAT DEFENDANT'S CHARACTER WITNESSES SHOULD BE ALLOWED TO GIVE THEIR OWN OPINION OF DEFENDANT'S CHARACTER

Although the entire structure of the way in which character testimony is given in a criminal case has been critized as illogical and archaic,[1] defendant is not seeking any major changes in that structure. Rather, defendant is seeking only one modification--that character witnesses be allowed to state their own opinion of defendant's character, instead of being restricted solely to testimony as to defendant's reputation.[2] Defendant's contention is further narrowed in this regard; the witnesses are not being asked to testify as to specific instances

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1/ See Michelson v. United States, 335 U.S. 469 (1948)

2/ The Courts in the District of Columbia seem to follow generally the common law rules as to character evidence, including the restriction of testimony to reputation evidence. See Adams v. District of Columbia, 134 A.2d 645 (1957); Awkard v. United States, 352 F.2d 449, 122 U.S. App. D.C. 152 (1965).

evidencing good character, but only to give their general opinion as to defendant's character for the traits in issue.

I. Defendant's Contention is Supported by the Most Recently Adopted and Proposed Evidence Codes.

The most widely noted new evidence statute, California's Evidence Code, provides:

> Sec. 1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not [inadmissible] if such evidence is:
>
> (a) Offered by the Defendant to prove his conduct in conformity with such character or trait of character.
>
> (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).
>
> Calif. Ann. Evidence Code, Sec. 1102
> (Emphasis added)

The Advisory comments to this section note:

> The general rule under existing law excludes the most reliable form of character evidence and admits the least reliable. The opinions of those whose personal intimacy with a person gives them firsthand knowledge of that person's character are a far more reliable indication of that character than is reputation, which is little more than accumulated hearsay. See 7 Wigmore, Evidence Sec. 1986 (3d ed. 1940). The danger of collateral issues seems no greater than that inherent in reputation evidence. Ibid.

The Preliminary Draft of the proposed Rules of Evidence of the United States District Courts and Magistrates, promulgated by the Committee on Rules of Practice and Procedure of the

Judicial Conference of the United States (March 1969)--rules which, if adopted, will govern evidentiary matters in federal courts--states:

> Rule 4-05. Methods of Proving Character
>
> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. (Emphasis added)

The Advisory Committee's Note remarks:

> In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore Sec. 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with 'the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation".' It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Proposed Draft, p. 59-60 (1969).

In addition to the above-quoted codes, older proposed evidence codes have also abolished the distinction between opinion and reputation testimony by character witnesses. See, e.g., A.L.I., Model Code of Evidence, Rule 306(2)(a)(1942).

II. Defendant's Contention is Supported by the Commentators.

McCormick refers to the rule restricting character testimony to reputation as "a rule of relatively recent origin and doubtful expedience." McCormick, Handbook of Evidence,

Sec. 158, p. 334 (1954). But the most vivid statement on the issue belongs to Dean Wigmore. In Sec. 1986(b) of his treatise (3rd ed. 1940) he takes on this subject with characteristic fervor:

> So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief. A perusal of the records of State trials will show how natural, straightforward, and useful was this method of asking after belief founded on personal experience for intimacy . . . . Take the place of a juryman, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term 'reputation' occurs . . . . The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'.

III. Defendant's Contention is Supported by the Policies Underlying Character Testimony.

There are three ways in which a witness could testify as to a defendant's character: (a) reputation; (b) personal opinion; (c) specific instances of conduct. It is recognized, of course, that the most probative and reliable testimony would be that of the third type, specific instances of conduct. However, it is equally obvious that this type of testimony

would be the most prejudicial, and would lead to the highest degree of disruption of the trial in pursuit of collateral issues. For this reason, evidence of the third type is not permitted.

In the Supreme Court's major statement on character testimony, Michelson v. United States, 335 U.S. 469 (1948), the Court noted these conflicting policies, and referred to the collateral-issues point as the reason for restricting the testimony to reputation:[3/]

> While courts have recognized logical grounds for criticism of this type of opinion-based on hearsay testimony, it is said to be justified by 'overwhelming considerations of practical convenience' in avoiding innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation. 335 U.S. at 477-78.

This statement is true, but it only is valid as to the distinction between specific instances of conduct and general testimony. It does not relate to the distinction between general opinion evidence as to a person's character, and reputation evidence. As noted supra, n.3, Michelson was not concerned with this latter difference, and thus the Court had no occasion to examine the possibility of allowing opinion evidence where

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3/ The Court's discussion on this point was general dicta; the the case was concerned with, and the holding related to, the use of prior arrests by the prosecution in cross-examining the defendant's character witnesses.

no specific instances of conduct were included. Such an examination shows that opinion evidence should be allowed.

Opinion evidence is more relevant to, more probative of, a person's character, than is general reputation testimony, as Wigmore and the other authorities mentioned above have shown. Opinion evidence should thus be used, unless there are countervailing considerations; there are, however, none. A first possible objection might be the point noted in Michelson about collateral issues. However, since defendant is urging that the opinion evidence be solely general opinions of the witness as to the relevant character traits, there will be no collateral issues of facts as to specific past conduct which could distract the jury. 4/ A second possible objection--that opinion evidence is more prejudicial than reputation evidence--is also valid only if the opinion evidence contained specific instances of conduct. A final possible objection, that it is somehow harder to cross=examine a person who is testifying as to his opinion of a person, also fails to persuasion. Just as a reputation witness can be cross-examined as to the basis for his testimony (whether he heard others talk about the defendant), so can an opinion witness be examined about the defendant, so can an

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4/ It might be argued that a defendant will be able to find more witnesses with an opinion of him, than he could find who knew his reputation, and that therefore the trial would be cluttered with extra witnesses. This argument is without merit because the trial judge always retains his power to limit the number of character witnesses in the interest of trial convenience.

opinion witness be examined about the basis for his opinion--how well he knows the defendant, whether he might be biased, etc.

Therefore, to deny defendant his right to present opinion evidence as to his character would be to exclude the more relevant testimony without any countervailing reasons; this would be an abuse of the trial court's discretion to control a trial in such a manner that truth is obtained by the most relevant testimony possible, except where some interest requires that a less probative type of testimony be used. Such a denial would work prejudice to the defendant in two ways: (1) as Wigmore notes, the jury will credit his character witnesses less if they are restricted to reputation testimony, thus prejudicing the defendant's right to create a reasonable doubt in the jury's mind through the use of character testimony; 5/ and (2) some character witnesses, who have a deep and well-founded opinion of the defendant's character, but who cannot honestly say they have a true basis for stating the defendant's reputation in the community, may not be allowed to testify at all. An identical motion was granted in United States v. David W. McRae, Criminal No. 508-70, by The Honorable Gerhard Gesell, on June 9, 1970, and in United States v. Joseph Bundy, Criminal No. 241-70, by The Honorable Leonard Walsh on June 26, 1970.

For these reasons, defendant contends that he can offer the testimony of witnesses as to his relevant character traits,

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5/ Edgington v. United States, 164 U.S. 361 (1896)

and can obtain their personal opinion as to those traits.

Respectfully submitted,

Stuart S. Greenfeig
Public Defender Service
310 Sixth Street, N.W.
Washington, D.C. 20001
Counsel for the Defendant

IV. CONCLUSION

The indictments should be quashed and/or a judgment of acquittal be entered because of a lack of allegation of "felonious intent" in the indictments, opening statements, case-in-chief and entire case.

The case should be reversed and remanded with instructions to suppress introduction of evidence of 61 pieces of undelivered mail.

The case should be reversed and remanded with instructions that the defendant be allowed to have witnesses testify as to their general opinion of the defendant's character for the traits.

Respectfully submitted,

S/

Charles S. Vizzini
983 National Press Building
Washington, D.C. 20004
Tel: 638-5858

CERTIFICATE OF SERVICE

I certify that on the 2nd day of Aug, 1971, I did serve a copy of the aforegoing and annexed brief by hand delivery on the United States Attorney for the District of Columbia at the United States Court House in the District of Columbia.

S/
Charles S. Vizzini

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1140

UNITED STATES OF AMERICA, *Appellee,*

v.

BERNARD WELDON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
BROUGHTON M. EARNEST,
CHARLES E. BROOKHART,
Assistant United States Attorneys.

Cr. No. 1711-70

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TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the warrantless search of appellant's automobile was reasonable.

II. Whether the indictment should have alleged felonious intent.

III. Whether character witnesses should have been permitted to testify to their personal opinions of appellant's character.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1140

UNITED STATES OF AMERICA, *Appellee,*

v.

BERNARD WELDON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 30, 1970, an eight-count indictment was filed charging appellant with embezzlement of mail by a Postal Service employee, theft of mail matter, unlawful possession of stolen mail matter, delay of mail, and taking a letter before it had been delivered to its addressee and opening it.[1] Two of the counts were dismissed by the Government before trial, and on October 9, 1970, trial began before the Honorable Leonard P. Walsh and a jury. On October 14 the jury returned a verdict of guilty on the

[1] 18 U.S.C. §§ 1709, 1708, 1703 and 1702. The pertinent parts of these statutes are set forth in Appendix A, *infra*, p. 13-14.

first five counts and not guilty on the sixth count.[2] Appellant was sentenced to terms of eighteen to fifty-four months—all concurrent—with the execution of the sentence suspended on five years' probation. This appeal followed.

The Government's Case

Appellant was employed by the United States Postal Service as a letter carrier (Tr. 153-154). On March 3, 1970, Investigative Aide Alison Brown of the Postal Inspection Service initiated an investigation of reported irregularities in appellant's carrier route. The investigation was predicated upon reports by postal patrons that their mail had been tampered with (Tr. 153-154).[3] On March 10, 1970, Mr. Brown and another investigative aide, Russell Payne, prepared two test letters, one orange and one white, containing money treated with a fluorescent powder, which was invisible in ordinary light but showed a greenish-yellow glow under ultraviolet light (Tr. 5-7, 155-160, 168, 216-219, 272-273). The white envelope was addressed to 3075 Stanton Road, S.E., a non-existent address (Tr. 157-160). The orange envelope was addressed to 3088 Stanton Road, S.E., a genuine address (Tr. 155-160, 207-209, 217-219). Both letters were placed in with other mail that was to be delivered by appellant (Tr. 168-170).

The following day, March 11, appellant was kept under surveillance as he sorted his mail at the Anacostia Station. He fingered the two test letters, set them aside and then put them back in the bundle (Tr. 7-9, 220-225). At approximately 10:15 a.m. appellant left the station and proceeded to his mail route. He was observed to deliver some mail at 3088 Stanton Road (an apartment building), but he never delivered the orange test letter (Tr. 174-175, 207-209, 212-

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[2] After the dismissal of the two counts by the Government, the indictment was retyped to reflect the change (Tr. 142). The retyped indictment is set forth in Appendix B, *infra*, p. 15-17.

[3] A motion to suppress evidence was heard immediately before trial. Because the testimony of the witnesses was substantially the same at the pre-trial hearing and the trial, both will be cited in this counterstatement. The motion to suppress evidence was denied at the end of the hearing (Tr. 103-105).

214). Appellant finished serving his mail around 12:00 or 12:30 p.m. and left the area in his automobile (Tr. 150, 176, 252-253).

Appellant returned to the Anacostia Station at approximately 2:10 p.m. and worked on his returns (Tr. 226). At approximately 5:20 p.m. he went to the men's room, returned with two or three paper towels, reached into his mail satchel, wrapped something in the towels and placed it in his rear pocket. Then he punched out and left (Tr. 227). A check of his return case by the station superintendent showed that neither one of the test letters had been returned (Tr. 235-238). Appellant walked directly to his automobile, which was parked near the post office. Postal Inspector Andrew Achimovic walked up to the car, knocked on the window, and advised appellant, who was seated in the driver's seat, that he was under arrest (Tr. 51-53, 253-254). Appellant was taken into the post office, advised of his rights and asked to empty his pockets. He removed the orange test letter, wrapped in paper towels, from his rear pocket (Tr. 54, 256).

Appellant's car was moved to the post office parking lot and locked by Mr. Brown (Tr. 73-74). Postal Inspector Donald Warren, who was inside the post office when appellant was brought in and searched, picked up the car keys, went outside and searched appellant's car. Sixty-one pieces of first-class mail were removed from the trunk of the car (Tr. 71-75, 271-272). The second test letter was not recovered (Tr. 75).[4] Appellant was taken to the central post office, where his hands were examined under an ultraviolet light. The ends of his fingers had a greenish glow indicating the presence of fluorescent powder (Tr. 272-273).

The Defense Case

Appellant testified that on March 11 he came into the station, put up his mail and left to make his deliveries.

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[4] The sixty-one pieces of mail removed from the car were the subject matter of count six of the indictment. These were admitted into evidence at trial without objection (Tr. 282-283).

When he arrived at 3088 Stanton Road, S.E., he discovered that an orange envelope was open. He looked in it, saw some money, closed it up and put it back in his bag (Tr. 300-T—300-V). He knocked on the addressee's door but received no response. He stated that it was bad policy to deliver opened mail, so he did not leave it in the addressee's mailbox. After he finished his deliveries, he went home for lunch (Tr. 300-V—300-W), returning to the station at around 2:00 p.m. Appellant stated that he had intended to deliver the letter on the way home that evening (Tr. 300-X). He testified that he remembered delivering the other test letter (the one addressed to 3075 Stanton Road) to 3078 Stanton Road. He remembered this because a family that lived there had a name that sounded like "Shears." The addressee's name was Shears (Tr. 300-Y—300-AA). On cross-examination he stated that he had resealed the orange letter with tape (Tr. 343) and denied being inside his car when arrested (Tr. 345). He also denied that the letter had been wrapped in towels when he removed it from his pocket (Tr. 345).

Mrs. Carolyn Pratt testified that she had on occasion asked appellant to hold mail for her (Tr. 289-290), and that he would then deliver the mail on his way home at around 5:30 p.m. (Tr. 294). Mr. John Johnson, a postal employee, testified as a character witness that appellant had a good reputation "for honesty and integrity. And from the patrons that he has served, a good word." (Tr. 300-F—300-G.)

Rebuttal

On rebuttal, Mr. Brown testified that he observed appellant closely at 3088 Stanton Road and that appellant had never knocked on anyone's door while there (Tr. 378-379). Mr. Eugene Green, a resident of 3078 Stanton Road, testified that on March 11, 1970, there was no family at that address with a name that sounded anything like "Shears" (Tr. 384-385). A check of the rental records for all twelve apartments at 3078 Stanton Road showed that no tenant had a name that even resembled "Shears" (Tr. 389-391). Mr. Girard Parent, a questioned document analyst, testified that

the orange test letter had been forcibly opened and had been resealed with glue and tape (Tr. 400-401).

ARGUMENT

I. The warrantless search of appellant's automobile was reasonable in that it was a search based on probable cause.

(Tr. 5-9, 50-54, 73-75, 153-160, 168-176, 207-227, 235, 238, 252-256, 271-273, 378-379, 384-401)

Appellant does not contest the fact that the postal authorities had probable cause to search his automobile.[5] He instead bases his argument on the theory that the postal authorities should have obtained a warrant prior to undertaking the search. He asserts that a warrant could have been obtained as early as 2:10 p.m. However, it was not until appellant's work area had been checked at approximately 5:00 p.m. that the authorities knew for sure that appellant had not returned the test letters. Shortly thereafter appellant was seen to place the orange envelope in his pocket, so that there was no time to obtain either an arrest or a search warrant. Appellant was arrested while sitting in the automobile and taken back inside the Post Office, where the orange test letter was seized from him. The postal authorities at that point had probable cause to believe that the other test letter was in the automobile. The automobile was removed from the street, parked in the lot outside the Post Office, and searched. We submit that the search of the automobile was, under the circumstances, both reasonable and proper.[6] *Chambers* v. *Maroney, supra* note

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[5] Clearly there was probable cause for appellant's arrest, *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958), and for the subsequent search of the car, *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

[6] Appellant's reliance on *Chimel* v. *California*, 395 U.S. 752 (1969); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Preston* v. *United States*, 376 U.S. 364 (1964), and other similar cases, is misplaced, since those cases are inapposite for the reasons stated in *Chambers* v. *Maroney*, *supra* note 5; *i.e.*, in the *Preston* line of cases the police had no valid reasons to search the automobiles at all. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), is also dis-

5; *United States* v. *Free*, 141 U.S. App. D.C. 198, 437 F.2d 631 (1970).

In any event, assuming *arguendo* that the seizure of the sixty-one pieces of mail from the trunk of the car was unlawful, those items pertained only to the sixth count of the indictment (*i.e.*, the retyped indictment), and on that count the jury found appellant not guilty. Thus there is no issue before this Court regarding the search of the car at all.

II. Failure to allege felonious intent in the indictment was not error.

(Tr. 283-284, 320-330, 405-406)

Appellant argues that the indictment was defective in that it did not allege felonious intent.[7] His argument is meritless.

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tinguishable. In *Coolidge* the police, having obtained a warrant signed by the Attorney General of New Hampshire, impounded the car, had it towed to the police station, and two days later searched it for the first time. Here appellant's car was moved to the Post Office parking lot, *with appellant's permission*, to get it out of traffic and to safeguard it (Tr. 31). It was searched almost immediately after one of the two test letters was removed from appellant's possession (Tr. 71-75, 271-272). The car was not impounded and could have been removed by appellant's wife or anyone else who had a set of keys for it.

[7] Appellant makes no mention of which counts of the indictment he thinks are erroneous. His motions in the trial court challenged only the first, second, fourth and sixth counts of the indictment (as retyped) (Tr. 283, 405). Without reaching the question of whether or not this Court should consider the third and fifth counts, we submit that having been drafted in the language of the applicable statutes, 18 U.S.C. §§ 1702, 1708, the indictment is sufficient. *United States* v. *Gilchrist*, 347 F.2d 715 (2d Cir. 1965); *United States* v. *Upchurch*, 286 F.2d 516 (4th Cir. 1961).

The third count charged appellant with unlawful possession of a stolen letter, 18 U.S.C. § 1708, an offense which does not require specific intent. The elements of this offense are (1) that he had unlawful possession of the letter, (2) that the letter had been stolen from the mail, and (3) that at the time appellant unlawfully possessed the letter, he knew it had been so stolen. *Allen* v. *United States*, 387 F.2d 641 (5th Cir. 1968); *Webb* v. *United States*, 347 F.2d 363 (10th Cir. 1965); *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958). The third count clearly sets forth all the elements of this particular offense.

Appellant also seems to argue that there was insufficient evidence of felonious intent to sustain the verdict. Intent is generally a question for the trier of fact. *Morissette* v. *United States*, 342 U.S. 246 (1952). The jury may properly infer the requisite intent from all the facts and circumstances shown in the evidence. *E.g.*, *Parham* v. *United States*, 119 U.S. App. D.C. 242, 339 F.2d 741, *cert. denied*, 379 U.S. 935 (1964). *See also United States* v. *Harris*, 140 U.S. App. D.C. 270, 284-287, 435 F.2d 74, 88-91 (1970), *cert. denied*, 402 U.S. 986 (1971).

Rule 7 (c), FED. R. CRIM. P., requires that the indictment be a plain, concise and definite written statement of the essential facts constituting the offense charged.[8] To withstand a claim of insufficiency, an indictment must allege sufficient facts to inform the accused of the charges against him so as to enable him to defend against them and to permit him to plead former jeopardy should he again face prosecution for the same offense. *United States* v. *Debrow,* 346 U.S. 374 (1953); *Berger* v. *United States,* 295 U.S. 78, 82 (1935); *Hagner* v. *United States,* 285 U.S. 427, 431 (1932).

The courts have consistently held that indictments which follow substantially the wording of the statute, embodying the essential elements of the crime, are sufficient. *United States* v. *Debrow, supra; United States* v. *Henderson,* 73 App. D.C. 369, 372, 121 F.2d 75, 78 (1941); *United States* v. *Chunn,* 347 F.2d 217 (4th Cir. 1965); *United States* v. *Franklin,* 188 F.2d 182 (7th Cir. 1951). So long as the "essential allegations appear in any form or may by fair construction be found anywhere within the text of the indictment, it is sufficient." *United States* v. *Upchurch, supra* note 7, 286 F.2d at 519.[9] In dealing with violations of the particular statutes involved in the instant case, the courts have uniformly sustained indictments framed in the language of the statute. *In re Wright,* 134 U.S. 136 (1890); *United States* v. *Gilchrist, supra* note 7; *United States* v. *Upchurch, supra* note 7; *Kelly* v. *United States,* 166 F.2d 343 (9th Cir. 1948); *Thompson* v. *United States,* 202 F. 401 (9th Cir. 1913);

The evidence here was clearly sufficient to allow the case to go to the jury. *United States* v. *Lumpkin,* _____ U.S. App. D.C. _____, 448 F.2d 1085 (1971); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied,* 381 U.S. 837 (1947). *See also Crawford* v. *United States,* 126 U.S. App. D.C. 156, 375 F.2d 332 (1967).

[8] Rule 7 (c) provides in pertinent part:

> The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement.

[9] In *Potter* v. *United States,* 155 U.S. 438 (1894), the court held that if the language of a statute is, according to the natural import of the words, fully descriptive of the offense, then an indictment framed in the language of that statute is sufficient. *Id.* at 444.

United States v. *Hummer*, 322 F. Supp. 601 (N.D. Ill. 1971); *United States* v. *Trosper*, 127 F. 476 (S.D. Cal. 1904).[10]

As used in the indictment, the words "embezzle" and "steal" are words which have a settled technical meaning.[11] *Moore* v. *United States*, 160 U.S. 268, 270-271 (1895); *United States* v. *Britton*, 107 U.S. 655, 669 (1882). *See also United States* v. *Archambault*, 441 F.2d 281 (9th Cir. 1971); *Austin* v. *United States*, 134 U.S. App. D.C. 259, 414 F.2d 1155 (1969). "The word 'embezzlement,' of itself, implies a fraudulent and unlawful intent on the part of the person charged. No one can lawfully or honestly embezzle money or other property." *United States* v. *Atkinson*, 34 F. 316 (E.D. Mich. 1888). Similarly, the word "steal" is not used to designate technical larceny but rather a taking without leave or right. In this context, the use of the word in the indictment connotes a wrongful intent. *Austin* v. *United States, supra; United States* v. *Trosper, supra*, 127 F. Supp. at 477. We submit that the element of intent is inherent in the language of the indictment.[12] *Cf. United States* v. *Chunn, supra*, 347 F.2d at 721-722.

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[10] *Cf. Goode* v. *United States*, 159 U.S. 663 (1895); *United States* v. *Thomas*, 303 F.2d 561 (6th Cir. 1962); *Anderson* v. *United States*, 253 F.2d 419 (9th Cir. 1958); *O'Neill* v. *United States*, 236 F.2d 636 (6th Cir. 1956). *Contra*, *United States* v. *Jordan*, 284 F. Supp. 758 (D. Mass. 1968).

[11] Appellant, citing *United States* v. *Jordan*, *supra* note 10, asserts that 18 U.S.C. § 1709 is a substantial codification of a common-law crime. This conclusion is erroneous.

> The crime of embezzlement is based solely on statute and is designed to penalize those conversions which could not be prosecuted at common law as larceny because there was no trespassory taking. 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 514, at 191-192 (Anderson ed. 1957). *See also Nolan* v. *State*, 213 Md. 298, 314, 131 A.2d 851, 859 (1957).

The Supreme Court, in considering the predecessor of the present 18 U.S.C. § 1709, recognized the distinction between embezzling letters and stealing the contents of the letters. *United States* v. *Lacher*, 134 U.S. 624, 629-630 (1890). *See also Goode* v. *United States*, *supra* note 10.

[12] The courts in considering the charges of embezzlement from banking institutions (18 U.S.C. § 656) have sustained indictments which alleged only the statutory language. *United States* v. *Archambault*, *supra*; *United States* v. *Bearden*, 423 F.2d 805, 810 n.7 (10th Cir. 1970); *Williamson* v. *United States*, 332 F.2d 123 (5th Cir. 1964); *Ramirez* v. *United States*, 318 F.2d 155, 157-158 (9th Cir. 1963).

Appellant contends that the *Morissette* case, *supra* note 7, supports his contention that the indictment should specifically allege felonious intent. A close reading of the case, however, compels a contrary conclusion. In that case the Court was concerned with the fatal error committed by the trial court in taking away from the jury the issue of intent. It is true that the indictment did not allege felonious intent, but the reversal by the Supreme Court was not predicated upon that ground. In fact, the court indicated that "had the jury convicted on proper instructions it would be the end of the matter." 342 U.S. at 276. In the instant case the jury was fully instructed on the element of specific intent.[13] In *Ray* v. *United States*, 229 A.2d 161 (D.C. Ct. App. 1963), also cited by appellant, the court ruled that there was no substantial evidence from which criminal intent "*could be inferred.*" *Id.* at 162 (emphasis added). The court made no mention of the sufficiency of the information charging the offense.

In *United States* v. *Hummer*, *supra*, the court specifically

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In considering a case brought under 29 U.S.C. § 501 (c), which deals with the embezzlement, theft or conversion of assets of a labor organization, the Court of Appeals for the Eighth Circuit rejected the argument that felonious intent must be charged in the indictment and sustained the indictment which was framed in the language of the statute. *Doyle* v. *United States*, 318 F.2d 419 (8th Cir. 1963). *See also Colella* v. *United States*, 360 F.2d 792 (1st Cir. 1966).

[13] The trial court in defining embezzlement instructed that it included the element of specific intent (Tr. 321-323). The court referred to the intent requirement in the other counts (Tr. 324, 326, 329) and then again instructed the jury that "the offenses charged in this case each have the element of specific intent" (Tr. 329) and once more defined specific intent (Tr. 329-330).

Appellant's trial counsel considered specific intent and felonious intent to mean the same thing:

> MR. GREENFEIG: Your Honor, specific intent is stated in the—
>
> THE COURT: Yes, indeed, specific intent. The jury will be instructed on specific intent.
>
> MR. GREENFEIG: We would submit that the specific intent as stated in the instructions itself means felonious intent.
>
> THE COURT: All right. That is what you are depending on.
>
> MR. GREENFEIG: Well, specific intent. Felonious intent. We would submit that they are the same, your Honor, where the crime is a felony, the specific intent required would be felonious intent. (Tr. 406.)

We agree that the words "felonious intent" and "specific intent," within the context of this case, are synonymous.

rejected the holding in *United States* v. *Jordan, supra* note 10. In *Hummer* the court pointed out that the word "embezzled" as used in 18 U.S.C. § 1709 connotes to both lawyers and laymen that the act alleged was done with wrongful and felonious intent. 322 F. Supp. at 602.[14] The only other case cited by appellant, *Hughes* v. *United States,* 338 F.2d 651 (1st Cir. 1964), *rehearing denied,* 340 F.2d 609 (1965), has been limited in its applicability by the subsequent ruling in *Colella* v. *United States, supra* note 12. In *Colella* the court held "Our own case, *Hughes* v. *United States,* . . . while requiring an allegation of felonious intent in the indictment, *merely held that 'unlawfully' falls short of such allegation.*" 360 F.2d at 799 (emphasis added).[15]

In any event, assuming *arguendo* that intent should have been alleged in the indictment, we think it decisive that appellant has made no showing whatsoever of any prejudice stemming from the lack of such an averment. Absent such a showing of prejudice, any possible error must be considered harmless. *Smith* v. *United States,* 360 U.S. 1, 9 (1959); *Berger* v. *United States, supra,* 295 U.S. at 81; *Hagner* v. *United States, supra,* 285 U.S. at 433; *Jackson* v. *United States,* 123 U.S. App. D.C. 276, 279, 359 F.2d 260, 263, *cert. denied,* 385 U.S. 877 (1966).

III. The court properly refused to allow character witnesses to testify regarding their personal opinions of appellant's character.

(Tr. 144-146, 300-E—300-K)

"Character" testimony is admissible on behalf of a defendant in a criminal case, but a character witness should

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[14] Appellee has been unable to find *any* case which follows the holding in *Jordan.* We submit that the *Jordan* case should not be followed, in that it is predicated upon (1) the erroneous assumption that 18 U.S.C. § 1709 is a codification of common-law offenses and (2) a misconception of the holding in *Morissette* v. *United States, supra* note 7.

[15] One of the judges from the *Hughes* panel was also on the panel in *Colella.*

not be allowed to testify if he does not know the defendant's reputation as to the character trait in issue. *Awkard* v. *United States,* 122 U.S. App. D.C. 165, 352 F.2d 641 (1965). In *Awkard,* although reversing the conviction because of improper cross-examination of a character witness by the prosecutor, this Court made it plain that the character testimony should not have been admitted at all:

> On direct examination, [the witness] testified that she did not know the defendant's reputation in the community for peacefulness and good order, the character traits relevant to the crime charged. *The prosecuting attorney could have objected at this point and had her testimony excluded.* 122 U.S. App. D.C. at 168-169, 352 F.2d at 644-645 (emphasis added).

Appellant candidly admits that he advocates a change in the law to permit the witness to give his own opinion as to the character trait in issue. Traditionally the law has been that a character witness may testify only as to reputation; he may not testify that "his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possess a good general or specific character inconsistent with commission of the acts charged." *Michelson* v. *United States,* 335 U.S. 469, 477 (1948). Moreover, even if appellant's argument had merit, it lacks support in the record. No proffer was made as to what witnesses would be called or what their personal opinions would be (Tr. 144-146). In fact, appellant's trial counsel indicated that the character witnesses would be able to testify as to appellant's reputation in the community (Tr. 146), and one character witness did so testify (Tr. 300-G).

The same argument which appellant makes here was presented to this Court in *United States* v. *Hinkle,*——U.S. App. D.C.——, 448 F.2d 1157 (1971).[16] This Court, citing *Michelson* and *Awkard, supra,* rejected the argument. ——U.S. App. D.C. at——, 449 F.2d at 1161. It has no more force here than it had in *Hinkle.*

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[16] *See* Brief for Appellant at 36-46 in *United States* v. *Hinkle, supra.*

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
BROUGHTON M. EARNEST,
CHARLES E. BROOKHART,
Assistant United States Attorneys.

APPENDIX A

18 U.S.C. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1703 (a) provides:

> Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or the Postal Service, shall be fined not more than $500 or imprisoned not more than five years, or both.

18 U.S.C. § 1708 provides in pertinent part:

> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1709 provides:

> Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

APPENDICES

APPENDIX B

The indictment as it was retyped and submitted to the jury was as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The United States of America v. Bernard Weldon	Criminal No. 1711-70 Violation: 18 U.S.C. 1709, 1708, 1703, 1702 (Embezzlement of Mail by Postal Service Employee; Theft of Mail Matter; Unlawful Possession of Stolen Mail Matter; Delay of Mail; Taking a Letter Before It Had Been Delivered to Addressee and Opening Same)

The Grand Jury Charges:

FIRST COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon, being a Postal Service employee, did embezzle two letters which had theretofore been intrusted to him, and which had come into his possession intended to be conveyed by mail, one of the said letters being addressed to "Mrs. Ruby F. Persons, 3088 Stanton Road, S.E., #202, Washington, D.C. 20020," and one of the said letters being addressed to "Mr. & Mrs. Frank L. Shears, 3075 Stanton Rd. S.E., #102, Washington, D.C. 20020."

SECOND COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon, being a Postal Service employee, did steal, abstract and remove $25.50 from two letters which had theretofore been intrusted to him and

which had come into his possession intended to be conveyed by mail, one of the said letters being addressed to "Mrs. Ruby F. Persons, 3088 Stanton Road, S.E., #202, Washington, D.C. 20020," and one of the said letters being addressed to "Mr. & Mrs. Frank L. Shears, 3075 Stanton Rd. S.E., #102, Washington, D.C. 20020." These are the same letters which are referred to in the first count of this indictment.

THIRD COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon unlawfully had in his possession a letter addressed to "Mrs. Ruby F. Persons, 3088 Stanton Road, S.E., #202, Washington, D.C. 20020," which had been stolen from the mail, well knowing that the said letter had theretofore been stolen. This is one of the letters referred to in the first and second counts of this indictment.

FOURTH COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon, being a Postal Service employee, unlawfully detained, delayed, opened and secreted a letter which came into his possession and which was intended to be carried and delivered by a carrier and employee of the Postal Service. This is the same letter referred to in the third count of this indictment.

FIFTH COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon, being a Postal Service employee, did take a letter which had been in his custody, and with design to obstruct the correspondence, did open and embezzle the said letter before it had been delivered to "Mrs. Ruby F. Persons, 3088 Stanton Road, S.E., #202, Washington, D.C. 20020," to whom it was directed. This is the same letter referred to in the third and fourth counts of this indictment.

SIXTH COUNT:

On or about March 11, 1970, within the District of Columbia, Bernard Weldon, while an employee of the Postal Service, unlawfully detained, delayed, opened and secreted sixty-one pieces of first-class mail which came into his possession, and which were intended to be carried and delivered by a carrier and employee of the Postal Service.

[Signatures omitted.]

☆ U.S. Government Printing Office: 1972—454-729/430

/REPLY/ BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 71 - 1140

UNITED STATES OF AMERICA,

APPELLEE

v.

BERNARD WELDON,

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

John C. Bennison
Appointed Counsel
1633 Conn. Ave., N.W.
Wash., D. C. 20009

CHARLES S. VIZZINI
Appointed Counsel
983 National Press Building
Washington, D. C. 20004
Tel: 638-5858

I N D E X

TABLE OF CASES

* Cases chiefly relied on.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 71 - 1140

UNITED STATES OF AMERICA,

APPELLEE

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BERNARD WELDON

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

A R G U M E N T

I. ADMISSION INTO EVIDENCE OF MAIL TAKEN FROM DEFENDANT'S TRUNK WAS PREJUDICIAL ERROR

Although appellant was found not guilty on the sixth count, its admissibility was so damaging and prejudicial that it may well have brought about the compromise verdict obtained.

II. THE INDICTMENT SHOULD HAVE ALLEGED "FELONIOUS INTENT"

There appears to be a direct conflict between the circuits with respect to this issue. Appellant has cited U.S. v. Jordan 284 Fed Supp 758. The Government cites United States v. Hummer 322 F. Supp 601. In both cases, the indictment used the words "embezzled." In Jordan, supra, this was not enough; in Hummer, supra, it was enough.

The attempt to distinguish Hughes v. United States 338 F2nd 651, by Collella v. United States, 360 F2nd 792, fails. In Hughes, supra, the offending language was "unlawfully." Collella, supra, distinguishes Hughes, supra, in that in Collella the word willfully was considered sufficient. None of the Counts of the indictment in the case at bar allege "willfully" or "Felonious Intent." It is this essential element of willfullness or intent which is lacking.

III. TESTIMONY AS TO GENERAL PERSONAL KNOWLEDGE OF CHARACTER TRAITS IN ISSUE SHOULD HAVE BEEN ALLOWED

The Government cites United States v. Hinkle 448 F2nd 1157 as the latest case in this circuit. It is important to note that in Hinkle, supra, the proffer was the testimony of a witness who was not familiar with reputation, whereas, in the instant case one of the proffers was a witness who would testify as to her personal general knowledge of the defendant's character for the traits in issue as well as to his reputation in the community.

Hinkle, supra was based upon a misplaced reliance on Michaelson v. United States, 335 U.S. 469. In Michaelson, supra, the court held that the witnesses could not testify as to specific instances of good character (at 477, 478). In the instant case, appellant merely asked to be allowed to have witnesses give their testimony of the defendant's character for the trait in

issue. If hearsay reputation evidence is admissible a fortiore this direct knowledge evidence is admissible.

To deny defendant this right would be to deny him use of relevant evidence considered so fundamental to a fair trial in Michaelson (at 476). This evidence is extremely important now that "reputation in the community" evidence is not available because there are no longer any communities.

Respectfully submitted,

S/

Charles S. Vizzini
Appointed Appellate Counsel
983 National Press Building
Washington, D.C. 20004
Tel: 638-5858

CERTIFICATE OF SERVICE

I certify that on the 14th day of February, 1972, I did serve by hand delivery, a copy of the aforegoing and annexed "Reply Brief For Appellant" Bernard Weldon on the United States attorney for the District of Columbia at his office in the United States Court House, third and Constitution Avenue, N. W. in the District of Columbia.

S/
Charles S. Vizzini